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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

Supreme Court, U.S.
FILED
MAR 1 1972
E. ROBERT SEAVER, CLERK

No. 71-945

JEROME H. LEMELSON,

Petitioner,

versus

TOPPER CORPORATION and THE GREAT ATLANTIC & PACIFIC TEA CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Statement of the Case

The respondents' brief states that the "accused toy guns were found not to infringe the

patent in suit. This finding was affirmed on appeal". In fact, the Circuit Court of Appeals did not affirm the finding of infringement. Footnote 4 of its Opinion is as follows:

> "Our disposition of the issue of the patent's validity renders unnecessary disposition of appellant's claim of infringement. Accordingly, we express no opinion on the District Court's resolution of the issue of whether the doctrine of equivalents or the doctrine of file wrapper estoppel applies to the facts of this case. See 321 F.Supp. at 1285-1288".

Argument

I. National Uniformity

The respondents state that "Petitioner does not dispute that the present standards are clear and certain". Completely to the contrary, Petitioner's whole argument on this point is that the present standards are unclear and uncertain. That the different circuits in this country have effectively different standards of patentability is notorious and is shown by the many disputes regarding forum in patent cases.

II. The Commerce Clause

Contrary to Respondents' brief, Petitioner does not desire a different patent statute. The difficulty does not lie with the statute but rather with the too restrictive interpretation of that statute by some prior decisions of this court.

III. Obviousness

The Respondents do not contest that the prior art, when put together, will not work. Nor do they explain how devices which will not work make a different device obvious. In this case A plus B does not equal C and does not make C obvious.

Respectfully submitted,

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February 28, 1972